Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SURINDER BAINS,

Petitioner,

v.

STEVE CAMBRA,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SURINDER BAINS, Petitioner, vs. STEVE CAMBRA, WARDEN, Defendant.	No. C97-2906 FMS TENTATIVE ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS (Filed July 2, 1998)

INTRODUCTION

Petitioner Surinder Bains (hereafter petitioner), a state prisoner incarcerated at CSP Pelican Bay filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging violations of his due process right to a fair trial, his equal protection rights, and his Sixth Amendment confrontation rights.

BACKGROUND

On August 26, 1993, petitioner was convicted of first degree murder in violation of California Penal Code § 187 with the special circumstance that the murder was committed by lying in wait, Penal Code § 190.2(a)(15) in the Superior Court of the State of California for Santa Clara County. Petitioner was sentenced to a term of life without the possibility of parole.

Petitioner filed a timely notice of appeal of his conviction. The state appellate court found numerous errors in the record, but affirmed petitioner's conviction after

determining that none of the errors had caused him prejudice. The state supreme court denied review on May 16, 1996. Petitioner filed a writ of habeas corpus in the state supreme court on may 6, 1997. The supreme court denied his petition on the merits but without comment on July 30, 1997.

The victim was petitioner's former brother-in-law, Gurmeet Shergill (Shergill). Shergill was murdered on September 23, 1990 as he got out of his car in the carport of his apartment complex in Sunnyvale, California. Following a long investigation of the crime, the Santa Clara County district attorney charged petitioner and a co-defendant, Rafael Hidalgo (Hidalgo), with the murder on the theory that petitioner had hired Hidalgo to kill Shergill because Shergill had divorced petitioner's sister.

History

In 1982, petitioner's sister Balbinder Bains (Balbinder) went to India to find a Sikh husband. Her family and the family of Gurmeet Shergill arranged for Balbinder and Shergill to marry. Shergill was reluctant to marry Balbinder, but he ultimately agreed, and the two married and returned to the United States. In 1983, Balbinder gave birth to a son, Victor. In 1984, Shergill started dating Kathy Hamilton. A short time later, he and Balbinder separated. In 1986, they divorced. (App. 2)[1]

In August 1990, the month before he was killed, Shergill went to India. On September 1, Shergill phoned

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[1] References to the state court of appeals decision will be designated hereinafter as "App."

his son Victor from India. On September 2, Balbinder left home in Sacramento to visit Jaswinder Singh, a childhood friend of Shergill's. Balbinder told Jaswinder that she wanted to reconcile with Shergill. Balbinder asked whether Shergill had gone to India to find a new wife. Balbinder said her brother told her that Shergill might be killed if he remarried. (App. 4-5)

On September 12, 1990, while Shergill was still in India, Cheryl Jensen, a resident of Shergill's apartment complex, saw someone sitting in a car in her parking stall, which is directly behind Shergill's stall. She asked him to move out of the spot, and he did. Her description of the man resembled Hildalgo, and her description of the car resembled Hildalgo's car. (TR 106301073).[2]

On September 13, Ellen Pierce, another neighbor, returned home and saw a man in the car port, bending down to look at license plates. She testified that he seemed most interested in a red Acura, which is the kind of car that Shergill drove. She saw the same man later that day. Her description of the car resembled Hidalgo's car and her description of the man resembled Hidalgo, but there were also differences in their characteristics. (App. 5-6)

Also on September 13, at 7:32 p.m., someone made a one-minute phone call to petitioner's house from the phone in Shergill's apartment. At the time the call was made, however, Shergill was at the airport, having just returned from India. (TR 154, App. 6) Later, at trial, a

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[2] References to the trial transcript will be designated hereinafter as "TR."

locksmith described scratch marks that were found on Shergill's apartment doorknob, saying they were consistent with someone having picked the lock.

On September 18, Janet Spinks, another neighbor, saw an unfamiliar man who resembled Hidalgo standing close to the door of Shergill's apartment. When he noticed her, he walked away. (App. 6)

At 8 p.m. on September 23, neighbors Joseph Mullins and his wife Catherine Quinn-Mullins heard scuffling, loud talking, and then a scream coming from the car port area. They then saw three men running away. Quinn-Mullins testified that one of them resembled Hidalgo. Mullins called 911 and then went to investigate. He found Shergill on the pavement covered in blood. Shergill said he had not been robbed and mumbled something about three strangers. (App. 7)

Two other neighbors, Sarah Parks and Barbara Citron, both testified that they heard screams and then saw three people leaving the car port. Both gave descriptions of one of the men that resembled Hidalgo. Dorothy Longshore also heard screams and then saw two or three men fleeing the car port. She said that at least one got into a car that matched the description of Hidalgo's car. (App. 7-8)

When the police arrived, Shergill was unconscious, and he died about an hour later. An autopsy revealed a cut and four blunt trauma injuries on his head. He also had two deep stabs in his chest. All of the wounds could have been inflicted by a hammer and knife recovered at the scene. (App. 8)

The Investigation

Neither the knife nor the hammer revealed usable fingerprints. However, Hidalgo's fingerprints were found on the driver's door frame and window of Shergill's car. Investigation revealed that tire tracks found at the scene had tread characteristics similar to the tires of Hidalgo's wife's car. When the police impounded Hidalgo's wife's car and tested for the presence of blood, many areas of the car tested positive. Police were unable to match the blood stains to samples of Shergill's or Hidalgo's blood, however. (App. 10).

On July 31, 1991, police searched petitioner's residence pursuant to a warrant. They found two telephone ledgers containing, among other things, the phone numbers for Hidalgo's home and workplace and Laureano Hidalgo's residence. Laureano is Hidalgo's twin brother. Police investigators also collected evidence of numerous phone calls between petitioner's home and office and the homes of Hidalgo and his brother between August 28 and September 27, 1990. There were also calls from petitioner's residence to Shergill's apartment and from Hidalgo to petitioner's workplace. Of particular note at trial were calls on September 13, the day Shergill returned from India, which included a call from petitioner's apartment to Shergill's apartment and a call from Shergill's apartment to petitioner's apartment that both occurred before Shergill had returned home from the airport. (App. 10).

During the search of petitioner's residence, police found a check dated July 1990 for $200 that was signed by petitioner's wife and deposited by Hidalgo. Before the

police placed Hidalgo in custody, they allowed him to call home. Unbeknownst to him, police recorded the call. Hidalgo spoke in his Philippine dialect. Among other things, Hidalgo said, "the person where we got the $200, tell them you don't know that person." (App. 13).

Later on the day that the police searched petitioner's home, two police officers arrived at petitioner's workplace and requested to speak to him. When he expressed hesitation to talk at work, they moved the conversation to the police station. The parties dispute whether the officers asked petitioner to accompany them to the police station or whether petitioner suggested that they go to the police station. It is undisputed, however, that they traveled together to the police station and entered the interview room. Once there, officers told petitioner that they had interviewed Hidalgo in conjunction with the Shergill murder and that Hidalgo had "pointed a finger at" petitioner. Petitioner was then questioned for six hours by three police officers and one police polygraph examiner. Petitioner was not read his Miranda rights until approximately four hours into the interrogation, despite the fact that petitioner requested a lawyer more than once. Petitioner also asked if he could leave to go home or at least call his wife, and the officers said no. (TR 126-27, 133). The state trial court did not admit statements obtained during the questioning from the point that petitioner requested a lawyer onward, but the court did admit statements made up to that point.

Police officers testified at trial that when they interviewed petitioienr, he first claimed that he only had contact with Hidalgo during overtime at Maxim Corporation where they both worked. He said that he did not

know Hidalgo's family, phone number, or address and that he had never loaned Hidalgo money. (TR 3207-12) Police testified that petitioner later said that he might have spoken to Hidalgo after leaving Maxim because Hidalgo was looking for a job. He then admitted that Hidalgo had come to petitioner's new place of employment to fill out a job application, but claimed that this was the last time they had spoken. He also admitted knowing Hidalgo's twin brother Laureano and said he might even know Laureano's phone number. He said he did not think he had Hidalgo's number. Then he said Laureano would call him at work and at home concerning job opportunities, but the last time was almost a year earlier. Police testified that petitioner ultimately said that he and Laureano were friends, and that he had both of the Hidalgo brothers' phone numbers. He denied having spoken to Hidalgo during the week before Shergill's death, however, and said he had no idea why Hidalgo would accuse him. At trial, the prosecutor emphasized the inconsistency between these denials and the records of the many phone calls between petitioner and Hidalgo.

Police also testified at trial that petitioner told them that his family had participated in the arranged marriage between Shergill and Balbinder. The family was very upset by their separation and Shergill's new girlfriend. Family members, including petitioner himself, had spoken to Shergill about it many times. Petitioner said his family even went to India and spoke with Shergill's parents about the situation. (App. 12) Police also testified about statements petitioner made to them about his strong Sikh faith and about his responsibility to support his sister after her divorce. (TR 3157, 3160).

At trial, Officer Muse read back a section of the transcript of the questioning in which the police challenged petitioner's story about where he was on the night of the murder. The officers asked why petitioner could remember the details of where he was and whom he was with on the night of the murder but could not remember when he had seen the same friends more recently. (TR 3237-39). Officer Muse also read back a somewhat garbled section of the transcript in which petitioner seemed to say that he thought Shergill was killed because of the divorce. (TR 3196-98). Petitioner also told police that he did know how or where Shergill was killed and that he had never been curious enough to ask his sister about it. (TR 3238). Officer Muse said that petitioner later admitted to knowing where Shergill was killed. (TR 3241).

Petitioner now claims that the admission at trial of statements made during the interrogation violated his Fifth Amendment Rights.

Testimony at Trial

At trial, Raymond Delgado, a paid police informant, testified that he had befriended petitioner in jail. He said that petitioner told him that a member of his family had been having problems with her husband concerning child support and custody, and that petitioner had thought the husband might take his son back to India. The families attempted to negotiate, but nothing came of this effort. Consequently, petitioner decided to end the problem. He called someone to have the husband killed. He planned and paid for the killing but did not want to participate himself. According to Delgado, the price was to be

$30,000. Delgado said petitioner told him that the assailant followed the victim home from a fast food outlet and – stabbed him. (App. 14). At trial, the defense presented considerable evidence to impeach Delgado and his testimony.[3] At closing argument, even the prosecutor distanced his case from Delgado's testimony, stating, "[Y]ou can take Mr. Delgado's testimony and put it completely aside and examine what's left and you still have the same convincing showing of Mr. Bains' participation in this crime." (TR 3815). Despite Delgado's questionable reliability, the state appellate court viewed his testimony as important evidence, citing it as a major reason why any errors at trial were harmless.

Petitioner is a practicing Sikh. At trial, several prosecution witnesses testified about the beliefs, attitudes, customs, and traditions in the Sikh community toward marriage and divorce. Collectively, they explained: Sikh

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[3] For example, Delgado said that he was offering information about petitioner in order to ensure that Delgado would be admitted into the Federal Witness Protection Program. (TR 3097). Several witnesses testified that they did not believe that Delgado really heard the story from petitioner. They said they saw Delgado reviewing court files in other people's cases and inquiring about petitioner's case so he would have a story for the police. (TR 3434-35, 3343-49, 3463-69). Delgado's testimony followed almost exactly the story set forth in published news articles and included the articles' incorrect assertion that Hidalgo ran into the victim at a fast food restaurant, followed him home, and killed him. (TR 2586-87). Delgado also falsely believed that were two children involved in the family dispute, not solely Shergill's son Victor. (TR 2589-90). Delgado's probation officers testified that he was a liar (TR 3376, 3382, 3419-20), as did women he had dated (TR 3390-91, 3396, 3480-85, 3432-36).

families take the institution of marriage seriously; marriages are commonly arranged by the families of the prospective spouses; the bride's family continues to have an active interest in the marriage after it takes place; the bride's family feels strongly that the husband must comply with the marriage contract; divorce is now common and acceptable when both spouses agree to it, but if only one spouse wants a divorce, it is uncommon and unacceptable but inevitable; when a husband leaves his wife and fails to carry out his obligations, the wife is considered "damaged goods" or an "unmarketable commodity," and the families of both spouses "take it very hard." (App. 17)

Officer Johl of the Sutter County Sheriff's Department was qualified and accepted by the court as an expert in the Sikh religion. He testified that there is potential for deadly violence in the community when a strongly held cultural value is violated as, for example, when a husband in an arranged marriage unilaterally decides to divorce his wife. In such circumstances, the bride's family would become hostile toward the husband and attempt to effect a reconciliation between the spouses. Male members of the family would take the lead in this effort. If a reconciliation could not be achieved, then to save face and honor, the hostility might escalate, and the husband could become the object of "violent revenge or retribution" involving threats and even death. It would be common for males to exact such revenge. (App. 17, TR 1644-71).

The prosecutor built on this expert testimony during closing arguments. He told the jury that "anyone who is familiar with the Sikh culture, especially as it is practiced

by relatively conservative tradition-oriented and traditional Sikhs, is going to find out that, unlike the culture here in United States, if you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence." (TR 3636) The prosecutor told the jury, "[T]he laws in United States [are] not what we're talking about. We're playing this game by Sikh rules." (TR 3654). He said that every Sikh who reads about this case would understand that the Bains clan had avenged their honor. (TR 3878).

To counter defense arguments that petitioner had assimilated into American culture, the prosecutor referred in closing argument to statements petitioner made to the police during the police interrogation. The prosecutor referred to petitioner's statement to police that "his turban and beard were important to him." (TR 3652). The prosecutor also referred to many statements petitioner made to police about how upset his family was about the divorce and how many efforts they made to convince Shergill to reconsider. (TR 3655-3658). Petitioner alleges that the admission of this testimony and the prosecutor's reliance on it violated his due process and equal protection rights to a trial free of improper racial or ethnic innuendo.

Over objection, the trial court allowed the prosecutor to introduce testimony by people who said that Shergill had told them that he was scared of the Bains family. Shergill's mother and father testified that in 1990 he said he was in fear for his own safety. (TR 735, 765). Shergill's friend Jaswinder Singh testified that Shergill told her that the Bains family had threatened him. (TR 1946). Shergill's attorney for the divorce testified that Shergill said he was

concerned for his own safety and that in a letter, Shergill had said he was "making a point to keep himself watchful, ever watchful, for his own safety." (TR 1114). The trial court believed that this evidence fell into the state-of-mind exception to the hearsay rule, pursuant to California Evidence Code section 1250. Because Shergill's state of mind was not at issue, however, the state appellate court found this testimony to be irrelevant and inadmissible. (App. 31-33).

The prosecutor also presented evidence of several threatening statements made by members of petitioner's family to third parties about the victim. Shergill's mother testified that after Balbinder and Shergill had separated in the mid-1980s, petitioner's mother issued a traditional Sikh threat to Shergill – that he "should receive beating by shoes in the head." (TR 731-732, 738-739). Shergill's brother testified that at about the same time, petitioner's aunt also threatened Shergill, saying that he would not be allowed to live in the United States or India if he divorced Balbinder. (TR 784, 786-787, 791). Kathy Hamilton, who dated Shergill after the separation, testified that in the mid-1980s, petitioner's sister told her to "get out" of Shergill's apartment and, moments later, told him that if he divorced Balbinder he would "be sorry." (TR 1021-1022). Jaswinder Singh testified that Balbinder said that petitioner had said if the victim returned from his 1990 trip to India with a new bride, he would be killed. (TR 1934).

The trial court admitted these statements by third parties after finding that they fell under Evidence Code section 1223, which establishes a hearsay exception for statements by co-conspirators. The state court of appeal,

however, found that the independent evidence did not establish a prima facie case of conspiracy sufficient to permit admission of the statements by petitioner's mother, aunt, or sister. The appellate court found the evidence sufficient only to establish a prima facie case that Balbinder had a tacit mutual understanding with petitioner to commit an unlawful act against Shergill. The appellate court found that Balbinder's statement to Jaswinder was therefore admissible as a statement by a co-conspirator. (App. 33-37).

The state court of appeal held that the trial court had erred in admitting the hearsay statements by the victim and by members of the Bains family. The appellate court found, however, that this error was harmless. One of the court's main reasons for declaring this error harmless was that Jaswinder's testimony that Balbinder told her that her brother said Shergill might be killed if he remarried was properly admitted at trial. The appellate court found that this evidence, along with the other evidence presented at trial, was enough to insure that the jury would have convicted petitioner even if the hearsay had not been admitted. (App. 38). Petitioner disagrees and alleges that the admission of these statements violated his Sixth Amendment right to confront adverse witnesses and was prejudicial.

The jury deliberated for eighteen hours over the course of four days before convicting petitioner.

DISCUSSION

I. Standard of Review

A writ of habeas corpus extends to prisoners who are "in custody in violation of the laws of the United States." 28 U.S.C. § 2241 (c) (3). If a prisoner is being unlawfully detained, the writ functions to "secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

In reviewing a petition for a writ of habeas corpus, a federal court is bound by the state court's interpretations of state law. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *LaMere v. Risley*, 827 F.2d 622, 623 (9th Cir. 1987). In addition, the federal court must presume the correctness of the state court's factual findings. *See* U.S.C. § 2254(d); *Kulmann v. Wilson*, 477 U.S. 436, 459 (1986). A federal court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Even if, under this deferential analysis, the Court finds that the reviewing state court's decision was unreasonable, the Court must ask whether the state court error was prejudicial. If the state court error was harmless, the habeas corpus petition must be denied. Under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the standard for reviewing errors on a habeas appeal is whether the error "had

substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637. Under the Supreme Court's interpretation of this standard in *O'neal v. McAninch*, 513 U.S. 432 (1995), the Court must ask, "Do I, the judge, think that the error substantially influenced the jury's decision?" *Id.* at 436. If the Court finds the record to be evenly balanced so that there is grave doubt as to the harmlessness of the error, the petitioner must prevail. *See id.* at 437.

A. Admission of Race or Ethnicity into a Trial

"[D]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *United States v. Doe*, 903 F.2d 16, 21 (D.C. Cir. 1990) (citing *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). "Racial fairness of the trial is an indispensable ingredient of due process and racial equality a hallmark of justice." *Id.* (citations omitted). Courts have engaged in "unceasing efforts" to eradicate the risk that racial prejudice will enter our criminal justice system. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986); *see McKlesky v. Kemp*, 481 U.S. 279, 309 n.30. (1987) (stating that "[t]he Constitution prohibits racially-biased prosecutorial arguments"). The Court must determine whether the admission of race or ethnicity into petitioner's trial was for permissible evidentiary purposes or for impermissible emotional reasons. *See Doe*, 903 F.2d at 25. If the admission was made for the latter purpose, the Court must determine whether the admission was harmless. *See id.* at 27-28.

B. Admission of Hearsay Evidence

The Sixth Amendment guarantees the right of an accused to confront adverse witnesses. *See Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965). This right includes the right to cross examine witnesses and to present relevant evidence. *See Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Wood v. Alaska*, 957 F.2d 1544, 1549 (9th Cir. 1992). To decide whether a writ of habeas corpus should be granted, the Court must determine whether a Confrontation Clause violation had an actual and prejudicial effect upon the jury. *See Webb v. Lewis*, 44 F.3d 1387, 1393 (9th Cir. 1994) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

C. *Miranda* Violations

Miranda v. Arizona, 384 U.S. 436 (1966), requires that a person subjected to custodial interrogation be advised that he has the right to remain silent, that statements made can be used against him, that he has the right to counsel, and that he has the right to have counsel appointed. *See id.* at 467-73. These warnings must precede any custodial interrogation, which occurs whenever law enforcement officers question a person after taking that person into custody or otherwise significantly depriving that person of freedom of action. *See id.* at 444.

The Ninth Circuit has further defined custodial questioning saying, "[C]ustodial questioning constitutes interrogation whenever, under all circumstances involved in a given case, the questions are 'reasonably likely to elicit an incriminating response from the suspect.' " *United States*

v. Booth, 669 F.2d 1231, 1237 (9th Cir. 1981) quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). An incriminating statement is any response – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial. *United States v. Poole*, 794 F.2d 462, 465-66 (9th Cir. 1986) citing *Innis*, 446 U.S. at 301 n.5. In determining whether a suspect was in custody during questioning, the court should consider whether a reasonable person in the situation would have believed he was free to leave. *See Meideiros v. Shimoda*, 889 F.2d 819, 822 (9th Cir. 1989); *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981).

The usual remedy for a *Miranda* violation is the suppression of the incriminating statements at trial. *See Miranda*, 384 U.S. at 479. If incriminating statements are admitted at trial in violation of *Miranda*, the Court grants habeas relief in the admissions " 'had a substantial and injurious effect or influence in determining the jury's verdict.' " *Pope v. Zenon*, 69 F.3d 1018, 1020 (9th Cir. 1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

D. Vagueness and Overbreadth of a Criminal Statute

A state prisoner may challenge a criminal statute as unconstitutionally vague and/or overbroad by way of a petition for a writ of habeas corpus if he was convicted under the statute. *See Melugin v. Hames*, 38 F.3d 1478, 1480-89 (9th Cir. 1994); *Panther v. Hames*, 991 F.2d 576, 578-80 (9th Cir. 1993). A petitioner may also challenge an "aggravating" or "special circumstance" that made him eligible for the death penalty. *See Tuilaepa v. California*, 512 U.S. 967, 972 (1994). To be constitutional, the aggravating

circumstance must meet two requirements: first, the circumstance must not apply to every defendant convicted of a murder and second, the aggravating circumstance must not be overly vague. *See id.*; *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). A factor is not unconstitutionally vague if it has some " 'common-sense core of meaning . . . that criminal juries should be capable of understanding.' " *Tuilaepa*, 512 U.S. at 973 (quoting *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White J., concurring in judgment)).

II. ANALYSIS

A. Errors Found by State Appellate Court: Admission of Race or Ethnicity Evidence and of Hearsay

The state appellate court court held that the trial court was correct to admit testimony by experts regarding the beliefs of the Sikh religion concerning marriage and divorce. The appellate court found, however, that the trial court erred in permitting expert testimony to the effect that if a husband seeks divorce against his wife's will, her family, especially its male members, may resort to deadly violence against the husband. The state appellate court also found that the reports by Shergill's friends and relatives of statements made by Shergill and the Bains' family were hearsay and should not have been admitted.

The state appellate court found that these errors were harmless. Viewing the errors in isolation, this Court finds that that decision was not unreasonable. As discussed

below, however, viewing them together with *Miranda* violations that the state court did not consider, the Court finds that the cumulative effect of these errors was prejudicial.

B. Miranda Violations

Because the California Supreme Court did not issue a written explanation of the its [sic] denial of petitioner's habeas petition, there is no state court opinion on the *Miranda* issue that this Court can review for reasonableness.[4] This Court therefore must review the *Miranda* claim de novo. *See Burris v. Parke*, 948 F.Supp. 1310, 1321 (N.D. Ind. 1996).

1. Error Analysis

The Court finds that petitioner was subjected to custodial interrogation during the police questioning and therefore should have been given *Miranda* warnings. First, respondents do not dispute that the officers' questions were designed to elicit incriminating statements from petitioner. Second, the Court finds that a reasonable person in petitioner's situation would not have felt he was free to leave during the questioning. Petitioner asked to leave during the questioning, and police told him that he was not "ready to go anywhere." (TR 126). He also

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[4] Petitioner's claim of *Miranda* violations was not raised until his habeas petition before the California Supreme Court. The state Supreme Court did not dismiss the *Miranda* claim on procedural grounds, however; instead, it issued a denial "on the merits" of the entire habeas appeal.

asked to be left alone, and the police denied this request as well. Detective Muse, one of the police officers who questioned petitioner, admitted later that petitioner was not free to go or to be left alone during the questioning. (TR 133). Any person who, while being questioned by two to three police officers in a police station, is told by the officers that he cannot leave would reasonably infer that he was not free to leave. Therefore, petitioner was in custody under *Meideiros*, 889 F.2d at 822, and *Booth*, 669 F.2d at 1235.

Because petitioner was subjected to custodial interrogation, his *Miranda* rights were violated during the four hours he was questioned without having been told of his right to remain silent. The trial court therefore erred in admitting statements petitioner made during that questioning.

2. Prejudice Analysis

To determine whether an error is harmless, the Court looks at the totality of the evidence presented at trial. *See Brecht*, 507 U.S. at 639 (Stevens, J., concurring). Factors such as the prosecutor's emphasis on erroneous testimony during closing argument, *see United States v. Kallin*, 50 F.3d 689, 693-94 (9th Cir. 1995), and the length of the jury deliberation, *see Parker v. Gladden*, 385 U.S. 363, 365 (1996); *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993), should also be considered.

To determine whether the *Miranda* error here was prejudicial, the Court must ask how much influence the testimony about petitioner's statements to police would

have had on the jury verdict in a trial that had properly excluded the hearsay testimony and the inappropriate expert testimony as well. If the erroneous evidence had been absent from the trial, the prosecution's evidence of motive would have been largely eviscerated. Without the erroneous evidence, the prosecution could not have shown how upset the Bains family was about the divorce. Although the expert testimony would still have indicated that divorce is frowned upon in Sikh culture, the jury would not have learned that Sikh men have been known to become violent in response to someone divorcing a female family member, and would not have known of the extent of the Bains family's own distress or of the many threats the Bains family was reported to have made to Shergill.[5]

In addition to providing the motive, the erroneous testimony cast much doubt on petitioner's innocence. For example, Officer Muse testified that during the questioning, petitioner claimed to remember in detail where he and his family were on the night of the murder but had at best very vague memories of evenings before or since. Officer Muse also testified that petitioner seemed to say that he thought Shergill was killed because of the divorce but that he also told police he did not know how or

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[5] The state appellate court found that Balbinder's statement to her friend Jaswinder that her brother said Shergill might be killed if he returned from India remarried was properly admitted at trial. Without reviewing that decision for error, this Court finds that the admission of that comment alone does not change the prejudice calculus, particularly given that Shergill did not remarry in India.

where Shergill was killed and that he had never been curious enough to ask his sister about it. (TR 3197; 3238).

Perhaps most significantly, the police testified that petitioner claimed he barely knew Hidalgo and that he did not know Hidalgo's phone number. In light of the phone records demonstrating many calls between petitioner and Hidalgo, petitioner's denials to the police that he nad any relationship with Hidalgo were particularly damaging to his defense.

Throughout the prosecutor's closing statement, he relied on the erroneous testimony. He repeatedly referred to comments petitioner made to police during the questioning. Time and again, the prosecutor emphasized petitioner's denials that he knew Hidalgo's phone number, talked to Hidalgo often, or knew Hidalgo's brother. (TR 3638, 3657, 3659, 3671, 3678, 3679, 3681-82). The prosecutor indicated the gravity of these statements by arguing that it was one of petitioner's undoings that he denied his communications with Hidalgo. (TR 3677). This analysis, combined with the emphasis the prosecutor put on the denials, show how crucial the denials were to the prosecution's case.

The prosecutor also relied in his closing argument on many of petitioner's statements to the police to establish motive. The prosecutor described petitioner's statements that the Bains family was very upset about the divorce and had made many efforts to enforce the marriage. (TR 3653, 3654, 3656, 3659-60, 3667). He repeated petitioner's accusation that Shergill came to the United States because he wanted a free pass into the country, Stanford University, and a job in Silicon Valley, and that he had intended

all along to walk out on the marriage. (TR 3652). He also used statements petitioner made to police that indicated that petitioner was a traditional Sikh in order to support the prosecution theory that petitioner had exhibited typically Sikh violent behavior in response to the divorce. (TR-3652-54, 3656, 3658).

The prosecutor also used evidence from petitioner's statements to police to raise questions about petitioner's alibi. He argued that petitioner gave detailed thought to constructing an alibi for himself and his family by bringing his family together with non-family members on the night of the murder. (TR 3637). All of the information about where petitioner was the night of the murder came from the police questioning. (TR 3237-39).

At trial, the jury deliberated for a long time, which may indicate that even with the erroneous testimony, the jury though the case against petitioner was a close one. The length of jury deliberation therefore supports the finding that the erroneous testimony was prejudicial. *See Parker v. Gladden*, 385 U.S. 363, 365 (1996) (considering the length of jury deliberations when judging the prejudicial impact of a trial error); *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

The prosecutor's closing argument was filled with statements petitioner had made to the police, reminders of the hearsay testimony about threats to the victim by the Bains family, and references to the violent tendencies of Sikh people. In light of the other trial errors, the emphasis in the prosecutor's closing argument on the statements to the police, and the length of jury deliberations, the Court finds that the admission of testimony

about petitioner's statements to the police had a "substantial and injurious influence in determining the jury's verdict." *See Brecht*, 507 U.S. at 637. Their admission therefore justifies the grant of habeas relief. *See Pope*, 69 F.3d at 1020; *Brecht*, 507 U.S. at 637.

C. Vagueness and Overbreadth of California Penal Code Section 190.2 (a) (15)

Petitioner contends that the lying-in-wait special circumstance, Cal. Penal Code § 190.2 (a) (15), is too vague to distinguish lying-in-wait from any other intentional killing. Lying-in-wait requires three elements: (1) a concealment of purpose, (2) a substantial period of watchful waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on the unsuspecting victim from a position of advantage. *People v. Morales*, 770 P.2d 244, 260-61 (Cal. 1989).

If a special circumstance applies to every defendant convicted of murder or if the circumstance statute is too vague, it is unconstitutional. *See Tuilaepa v. California*, 512 U.S. at 972. Petitioner argues that the first element of § 190.2 (a) (15) is present in virtually every intentional murder, that the second element is unconstitutionally vague because the word "substantial" is imprecise, and that the third element is just a repetition of the first element. The Court disagrees.

The § 190.2 (a) (15) special circumstance does not apply to every defendant convicted of murder. Although concealment of purpose may be present in most intentional murders, particularly premeditated ones, not every murder involves a "surprise attack" from "a position

advantage" immediately following a substantial period of "watchful waiting." A person who decides to kill someone after a few moments of contemplation may be convicted of premeditated murder. *See, e.g., People v. Mayfield,* 14 Cal. 4th 668, 767-768 (1997) (finding five seconds enough to make "cold and calculated decision . . . "). Yet a few moments could not comprise a "substantial period of watching and waiting," as this phrase has been interpreted by the California Supreme Court. *See People v. Edwards,* 54 Cal. 3d 787, 823 (1991) ("We have never required a certain minimum period of time [for the special circumstance of lying in wait], only a period not insubstantial.") In *Edwards,* the California Supreme Court found that jury instructions stating that

> lying in wait must be of sufficient duration to establish the elements of waiting, watching and concealment or other secret design to take the victim unawares and by surprise, and that a murder done suddenly without such waiting, watching and concealment is not murder by lying in wait

sufficiently conveyed the time period required for lying-in-wait. *Id.* Under *Edwards,* the requirements for lying-in-wait are neither overbroad nor vague.

Petitioner claims that a number of cases in which the state did not charge lying-in-wait demonstrate that the special circumstance is vague. For example, in *People v. Rosenkrantz,* defendant waited for hours outside victim's residence armed with an Uzi and then shot the victim when the victim emerged, but lying-in-wait was not charged. 198 Cal. App. 3d 1187 (1988). In light of prosecutorial discretion, however, nothing can be inferred

from the absence of a special circumstance charge in other cases. Petitioner is wrong to claim that these cases demonstrate that the definition of lying in wait is vague.

For the foregoing reasons, petitioner's claim that the definition of lying-in-wait is unconstitutionally vague is hereby DENIED.

CONCLUSION

For the foregoing reasons, the Court issues this tentative order GRANTING petitioner's habeas appeal on the basis of his due process and Fifth Amendment claims. The Court will hear oral argument on July 17, 1998 at 10:00 a.m. at which time parties may respond to its findings on the prejudicial effect of the *Miranda* error.

SO ORDERED.

Dated: July 2, 1998

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SURINDER BAINS, Petitioner, vs. STEVE CAMBRA, WARDEN, Defendant.	No. C97-2906 FMS ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (Filed Aug. 6, 1998)

INTRODUCTION

Petitioner Surinder Bains ("petitioner"), a state prisoner incarcerated at Pelican Bay State Prison, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging violations of his due process right to a fair trial, his equal protection rights, and his Sixth Amendment confrontation rights.

BACKGROUND

On July 2, 1998, the Court issued a Tentative Order regarding this petition. On July 17, 1998, the Court heard oral argument. Upon further consideration of the parties' oral arguments and the transcripts of the state court proceedings, the Court DENIES the petition for the following reasons.[1]

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[1] The facts of the case, as set forth in the Court's Tentative Order of July 2, 1998, are incorporated herein by reference.

DISCUSSION

I. Legal Standard

A writ of habeas corpus extends to prisoners who are "in custody in violation of the laws of the United States." 28 U.S.C. § 2241(c)(3). If a prisoner is being unlawfully detained, the writ functions to "secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

In reviewing a petition for a writ of habeas corpus, a federal court is bound by the state court's interpretations of state law. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *LaMere v. Risley*, 827 F.2d 622, 623 (9th Cir. 1987). In addition, the federal court must presume the correctness of the state court's factual findings. *See* U.S.C. § 2254(d); *Kulmann v. Wilson*, 477 U.S. 436, 459 (1986). A federal court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was decided in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

II. Analysis

A. Errors Found by State Appellate Court: Admission of Race or Ethnicity Evidence and of Hearsay

The state appellate court held that the trial court was correct to admit testimony by experts regarding the beliefs of the Sikh religion concerning marriage and divorce. The appellate court found, however, that the trial court erred in permitting expert testimony to the effect that if a husband seeks divorce against his wife's will, her family, especially its male members, may resort to deadly violence against the husband. The state appellate court also found that the reports by the victim's friends and relatives of statements made by the victim and the Bains family were hearsay and should not have been admitted. The state appellate court found, however, that these errors were harmless.

In the Tentative Order, the Court expressed its view that the cumulative effect of these errors, when combined with what the court preliminarily found to be a *Miranda* violation, was prejudicial. Upon further consideration, however, the Court finds that the trial court's adjudication of the *Miranda* issue was not erroneous.[2] Without the addition of a *Miranda* violation, the Court finds that the state appellate court's decision that the hearsay and expert testimony errors were harmless was not unreasonable.

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[2] As noted in the Tentative Order, the trial court properly excluded all of the statements petitioner made to the police following petitioner's first request for a lawyer.

B. Miranda Claim

Following a pretrial hearing, the state trial court stated, "The first issue addressed to the court is whether or not it was a custodial interrogation. And I find from the totality of the circumstances . . . that it was not." (Rep.'s Tr. 187). A finding about whether someone was subjected to custodial interrogation is "essentially a factual determination." *Medeiros v. Shimoda*, 889 F.2d 819, 822 (9th Cir. 1989); *see also United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981). The Court can therefore only grant petitioner a writ of habeas corpus on the basis of a *Miranda* violation if it finds that the trial court's determination that petitioner was not subjected to custodial interrogation was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254. The Court does not find that the trial court's decision was unreasonable in light of the evidence presented.

C. Vagueness and Overbreadth of California Penal Code Section 190.2(a)(15)

Petitioner contends that the lying-in-wait special circumstance, Cal. Penal Code § 190.2(a)(15), is unconstitutionally vague. For the reasons stated in the Tentative Order, the Court finds that the definition of lying-in-wait is not unconstitutionally vague.

CONCLUSION

For the foregoing reasons, the petition is DENIED. Judgment shall be entered in accordance with this order, and the Clerk of the Court shall close the file.

SO ORDERED.

Dated: August 5, 1998

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SURINDER BAINS, Petitioner, vs. STEVEN CAMBRA, et al., Respondents.	No. C 97-2906 FMS ORDER DENYING MOTION TO ALTER JUDGMENT; AMENDING ORDER (Filed Oct. 21, 1998)

Pending before the Court is plaintiff's Rule 59(e) motion to alter or amend the judgment in this habeas action. Having considered all the papers submitted on this motion, the Court DENIES plaintiff's motion to alter the judgment, but AMENDS its August 6, 1998 Order, at page 3, replacing lines 19 through 24 with the following:

> prejudicial. Without the addition of a *Miranda* violation, the Court finds that the state appellate court's decision that the expert and hearsay testimony errors were harmless was not "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . . " 28 U.S.C. § 2254(d) (1); *see also Moore v. Calderon*, 108 F.3d 261, 265 n.3 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2497 (1997) (providing that the "unreasonable application of" prong of section 2254 is the appropriate prong to apply to mixed questions of law and fact).
>
> Petitioner contends that the Court should have independently applied the harmless error test under *Brecht v. Abrahamson*, 507 U.S 619

(1993). The state appellate court conducted its prejudice evaluation under *California v. Watson*, 46 Cal. 2d 818 (1956) and its finding of harmless error was not unreasonable. In addition, the Ninth Circuit has equated the harmless error standard of *Watson* with that of *Brecht*. *See Henry v. Estelle*, 33 F.3d 1037, 1041 (9th Cir. 1993), *rev'd on other grounds sub nom, Duncan v. Henry*, 513 U.S. 364 (1995). Still, the Court has independently reviewed the record and, applying the *Brecht* standard to the errors made at trial, determines that the errors were harmless because the record failed to demonstrate that the trial errors "had substantial and injurious effect or influence in determining the jury's verdict." *See Brecht*, 507 U.S. at 637. The Court has also held an evidentiary hearing.

In the alternative, petitioner argues that the Court must conduct its own inquiry into whether the trial errors were prejudicial under *Chapman v. California*, 386 U.S 18 (1967). The state appellate court properly applied *Chapman* and found the errors to be harmless. The Court is not required to conduct its own *Chapman* review. *See Brecht*, 507 U.S. at 636 (finding that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*. . . . "). The argument, therefore, is unavailing.

In its opposition to this motion, the government raises doubts about whether this rule 59(e) motion tolled the time for filing an appeal. It did. The clock shall begin to run again from the date of this Order. SO ORDERED.

Dated: October 20, 1998

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge